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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 673

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, A CORPORATION,

Petitioner,

vs.

FERRIEL M. BARNETT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Justices of the United States:

Your petitioner, Terminal Railroad Association of St. Louis, a corporation, respectfully petitions for a Writ of Certiorari to review the decision of the U. S. Court of Appeals for the Eighth Circuit, reversing and remanding for a new trial a judgment in favor of petitioner and against respondent, Ferriel M. Barnett, in an action brought under the Federal Employers Liability Act, 45 U. S. C. A. Section 51.

Opinion Below

The opinion of the U. S. Court of Appeals for the Eighth Circuit is reported in Ferriel M. Barnett *vs.* Terminal Railroad Association of St. Louis, a corporation (not yet officially reported). A copy of the opinion begins on Page 30 of the Record.

Jurisdiction

This action arose and was determined under the Federal Employers Liability Act (45 U. S. C. A. Section 51), for damages for personal injuries to respondent while working as a car inspector and car repairman in petitioner's yards at St. Louis, Missouri. The case was tried before Division 1 of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and at the close of respondent's case the District Court upon motion of petitioner directed a verdict in favor of petitioner and against respondent. Thereafter respondent appealed to the United States Court of Appeals, and that Court remanded the case for a new trial, holding that the petitioner was not entitled to a directed verdict at the close of respondent's evidence, because the District Court should have permitted the case to go to the jury, reserving the Court's ruling on the Motion for Peremptory Instruction until after verdict. The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254(1). The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 16, 1953, and petitioner's motion for rehearing was denied by that Court on February 12, 1953.

Questions Presented

Respondent brought suit under the Federal Employers Liability Act, 45 U. S. C. A. Section 51, alleging that he was employed by petitioner as a car inspector and car repair-

man, and that he was injured as a result of the negligence of petitioner when an air hose coupling between two railroad cars burst apart, striking and injuring him while he was tightening a steam hose coupling between the two railroad cars.

Petitioner denied that it was negligent.

The evidence showed and the Court of Appeals found that the evidence on behalf of respondent did not show any particular act of negligence of petitioner.

At the close of the evidence presented by respondent in trial before the United States District Court, that Court directed a verdict in favor of petitioner.

Upon appeal by respondent, the Court of Appeals reversed and remanded the cause for a new trial, holding that petitioner was not entitled to a directed verdict at the close of respondent's evidence because the District Court should have reserved its ruling on the motion until after verdict; however, the Court of Appeals did not rule as to whether or not respondent's evidence was sufficient to sustain a verdict in his favor.

Questions

1. When a District Court has sustained a motion of defendant for a directed verdict at the close of plaintiff's case because the evidence is insufficient to sustain a verdict in favor of plaintiff, should a Court of Appeals reverse the District Court ruling upon the sole ground that the case should be submitted to a jury even though the District Court is of the opinion that plaintiff has not made a case for the jury, and should the Court of Appeals reverse on that ground without determining from the Record whether or not the plaintiff did in fact make a submissible case for the jury? or

Should the Court of Appeals in such a case determine from the Record whether or not the District Court was cor-

rect in its ruling and rule on the case in accordance with its decision in that regard?

2. In a case arising under the Federal Employers Liability Act (45 U. S. C. A. Section 51) is a United States District Court required to submit a case to the jury regardless of whether or not the evidence is sufficient to sustain a verdict in favor of the plaintiff? or

Is the District Court required to direct a verdict in favor of the defendant without submitting the case to the jury when the Court is of the opinion that the evidence is insufficient to sustain a verdict in favor of plaintiff?

3. If a District Judge is of the opinion that there is insufficient evidence to support a verdict for plaintiff in a personal injury accident, should he sustain a motion by defendant for judgment without submitting the case to the jury? or

Should the District Judge in such a case submit the case to the jury and then sustain the defendant's motion for judgment in the event that the jury returns a verdict in favor of plaintiff?

4. If a plaintiff is the only fact witness in a case arising under the Federal Employers Liability Act (45 U.S.C.A. Section 51), and he testifies that he was employed by defendant and injured when struck by an air hose coupling that parted while he was hammering on a steam line coupling just below it, and he testifies that he does not know what caused the air hose coupling to part but it could have been as a result of being struck by his hammer or it could have been because one of the cars of the train moved 4 inches, has plaintiff offered sufficient facts to make a submissible case of negligence for the jury? or

Under such evidence is defendant entitled to a directed verdict?

Statement

Respondent brought this action in the United States District Court for the Eastern Division of the Eastern Judicial

District of Missouri under the Federal Employers Liability Act, 45 U. S. C. A. Section 51 (R. 1).

By its answer to respondent's complaint, petitioner denied that it was negligent, and upon these issues the case was tried before a jury (R. 3).

At the close of the evidence on behalf of respondent petitioner moved the Court to direct a verdict in its favor on the ground that the evidence introduced by respondent was not sufficient to sustain a verdict in his favor and that the evidence failed to show that the air hose coupling came apart by reason of any violation of the Safety Appliance Act or by reason of any negligence on the part of petitioner (R. 9).

Respondent appealed to the U. S. Court of Appeals for the Eighth Circuit, and that Court reversed and remanded the cause for a new trial (R. 30).

The evidence showed and the United States Court of Appeals found the following facts:

On December 29, 1950, respondent was employed by petitioner as a car inspector and car repairman. Respondent went to a string of six passenger cars in petitioner's yards, which cars were coupled together with their air brakes set and were on a track which sloped. Petitioner blocked the wheels of the cars to keep them from rolling when the brakes were released by putting air into the air lines (R. 32). Respondent found that all of the steam, air, and signal lines of the cars were connected except between the two cars at the east end, being Car Number 1601 at the east end and car number 51 next to it. The air hose connection of 51 had ice all over it that was bigger than the head of the air hose coupling. Before coupling the air hose he beat all of the ice off of it and then made a coupling. He coupled the steam, air, and signal line of the two cars and then connected a steam line located in the yards to the west end of the six cars and then connected a compressed air line in the yards

to the East end of the six cars. There were two compressed air lines in the yard, a high pressure line and a low pressure line and the low pressure line was broken down and could not be used. The high pressure line sometimes carried 180 pounds, but there was no evidence as to how much it carried at the time of the accident. Respondent then began inspection of the string of cars and he found a leak in the steam line between cars numbered 1601 and 51. There was so much steam blowing out of the leak that he was unable to tell whether or not there was also a leak in the air hose coupling. He hammered on the steam hose coupling with his hammer in order to close the leak, but the steam obscured his vision so that he was unable to see exactly where he was hammering, and he could have struck the air hose coupling with his hammer.

Respondent testified that while he was using his hammer to tighten the steam hose coupling, car 1601 suddenly moved about 5 inches. The air hose coupling came apart and hit him, and he fell down. Respondent testified that a jar might knock the air hose coupling apart, and hitting it with his hammer could have knocked the coupler apart. He did not know whether he hit the air hose coupling with his hammer or not. He did not know what caused the air hose coupling to separate. He thought it was the sudden movement of the car that jerked the coupling apart. If the coupling was put together properly it would lock, but a sudden jar from the movement of the cars or striking the coupler with the hammer might knock the coupling loose. (R. 34).

Upon the above evidence the District Court directed the jury to return a verdict in favor of petitioner, and respondent appealed from that judgment. Upon respondent's appeal, the Court of Appeals reversed and remanded the case for a new trial. Thereupon petitioner filed a motion for a re-hearing which was denied, but the mandate of the Court

of Appeals was withheld pending the final outcome of this petition for certiorari (R. 47).

Basis of Opinion of the United States Court of Appeals

The Court of Appeals pointed out in its opinion that the only evidence at the trial bearing on the issue of liability was that of plaintiff (Respondent) himself (R. 32). The court then outlined the evidence in the case and from it concluded that, "It is apparent that the plaintiff's evidence made a rather unsatisfactory case on the issue of liability. He points to no specific act or omission of the defendant indicating that there was a lack of due care on its part" (R. 34). The court then went on to say, "It is safe to say that in a case such as the one before us, it is unwise for a trial judge to direct a verdict at the close of the plaintiff's evidence. We think that even though the trial court is of the opinion that the evidence will not support a verdict for the plaintiff, the court should ordinarily reserve its ruling by motion for a peremptory instruction until after verdict" (R. 35).

Without ruling upon the question of whether or not respondent had made a case for the jury, the Court of Appeals ruled that petitioner was not entitled to a directed verdict at the close of respondent's evidence. The court said, "* * * we think it is not inconceivable that a jury could have inferred that the last two cars of the train should have been completely coupled up when they were first set out, in order to prevent the formation of ice on the couplers of the air hose during freezing weather, or that the defendant should have furnished the plaintiff with more adequate means of removing ice from the air house coupling or of preventing the movement of the cars on the sloping track, or with an air line in the yard with lower air pressure. *This is not saying that upon a re-trial of this case when all the*

evidence is in, the plaintiff will have made a case for the jury. We make no predictions in that regard and go no further to say that in our opinion the defendant was not entitled to a directed verdict at the close of the plaintiff's evidence" (Emphasis added) (R. 36).

The above resume of the opinion of the United States Court of Appeals shows that it is of the opinion that a District Judge should not direct a verdict in favor of a defendant at the close of plaintiff's evidence, even though the District Judge is of the opinion that under the governing law the plaintiff has not made a submissible case for the jury. The Court of Appeals does not rule that there is sufficient evidence to warrant a judgment in favor of respondent and in fact does not rule either way on the question of liability, but instead the Court of Appeals rules that in either event the District Court must submit the case to the jury and decide the question of the sufficiency of the evidence after the jury has returned its verdict.

Reasons for Granting the Writ

I

In its decision the Court of Appeals has decided that petitioner's motion for a directed verdict at the close of respondent's case should not have been sustained for failure to make a submissible case, but the Court of Appeals did not base its ruling in this regard upon a finding that the evidence *was* sufficient; rather, it based its decision upon a ruling that the District Court should have permitted the case to go to the jury regardless of whether or not a submissible case was made and have reserved its ruling on the motion for a peremptory instruction until after verdict.

Therefore, the decision of the Court of Appeals is in conflict with controlling decisions of this Court, which decisions hold that it is the duty of a trial judge to direct a verdict for

defendant when he is of the opinion that the evidence will not support a verdict for the plaintiff.

Pennsylvania Railroad Co. v. *Chamberlain,* 288 U. S. 333, 77 L. ed. 819;

Barrett v. *Virginian Ry. Co.,* 250 U. S. 473, 63 L. ed. 1092.

II

The effect of the published opinion of the Court of Appeals will be to cause District Judges in any civil case tried before a jury to permit the jury to pass upon the case even though the judge is of the opinion that there is insufficient evidence to warrant a submission of the case to the jury, and the District Judge will refrain from directing a jury to return a verdict for defendant in any case.

III

If the decision of the Court of Appeals is permitted to stand so that a trial judge is required to submit to the jury a case in which he does not believe the evidence is sufficient to sustain a verdict for plaintiff, the trial judge will be in the impossible position of having to instruct the jury as to the law when he knows or is of the opinion that what he declares to be the law is in fact contrary to law; thus destroying the respect of the public and legal profession accorded to judges of the United States District Courts.

IV

If the decision of the Court of Appeals can be interpreted to apply only to cases arising under the Federal Employers Liability Act as compared to any other negligence action, the Court has erroneously ruled that cases arising under that Act are not subject to the same rules of procedure and the same quality of proof required to prove negligence in

other actions, which is contrary to controlling decisions of this Court.

45 U. S. C. A. § 51;

Wilkerson v. *McCarthy*, 336 U. S. 53, 93 L. Ed. 497.

V

An important question of procedure in Federal Courts is presented in this petition. If a trial judge shall not be allowed in the future to take a negligence case from the jury, motions for a directed verdict filed before submission to a jury will become meaningless except as a technical means of preserving for subsequent review the legal question of whether or not a submissible case was presented. It may be within the power of the courts to change this procedural step, but it would be such an important change that it should be announced or affirmed by this Court.

Rule 50, Rules of Civil Procedure for the United States District Courts, 28 U. S. C. A.

Prayer

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of this Court directed to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court a transcript of the Record in the case entitled "Ferriel M. Barnett, Appellant, v. Terminal Railroad Association of St. Louis, a corporation, Appellee, No. 14692," including the proceedings in the Court of Appeals to the end that the cause may be removed and determined by this Court and the judgment of the Court of Appeals reversed.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

The facts with reference to the opinion of the United States Court of Appeals, jurisdiction of this Court, and a statement of the case have been sufficiently covered in the petition for writ of certiorari and will not be here repeated.

Specification of Error to Be Urged

The United States Court of Appeals for the Eighth Circuit erred:

1. In ruling that the trial Court was in error when it directed a verdict in favor of defendant after plaintiff had closed his case.

2. In ruling that a trial judge should not direct a verdict in favor of defendant without submission of the case to the jury when the trial judge is of the opinion that the evidence will not support a verdict for the plaintiff.

3. In reversing the judgment in favor of petitioner based upon the direction of a verdict by the trial judge, which reversal was based solely upon the fact that the case was not submitted to the Jury, and the question of whether or not there were sufficient facts to warrant submission of the case to the jury was not decided by the Court of Appeals.

5. In ruling that defendant was not entitled to a directed verdict at the close of plaintiff's case when in fact there was insufficient evidence in the case to support a verdict for the plaintiff.

ARGUMENT

I

If a Trial Judge Is of the Opinion That There Is Insufficient Evidence to Support a Verdict for the Plaintiff, the Judge Is under a Duty to Direct a Verdict for Defendant upon Proper Motion Therefor.

We will refer to petitioner as defendant and to respondent as plaintiff.

Upon trial of this case before a jury and at the close of plaintiff's case, defendant moved for a directed verdict and the motion was granted (R. 9). Judgment was entered for defendant, and plaintiff appealed to United States Court of Appeals (8th Circuit), which court reversed and remanded the case for a new trial, whereupon defendant has filed this petition for a Writ of Certiorari.

This case is for personal injuries of an employee and arises under the provisions of the Federal Employer's Liability Act, *45 U. S. C. A. §51 et seq.* A cause of action under that Act must be based on negligence. See *Wilkerson* v. *McCarthy*, 336 U. S. 53, 61; 93 L. ed. 497, 504. The trial court ruled that the evidence in the case was not sufficient to establish negligence of defendant and therefore sustained defendant's motion for a directed verdict at the close of plaintiff's case (R. 10).

The Court of Appeals reversed and remanded, holding that defendant was not entitled to a directed verdict (R. 36) but without ruling upon whether or not negligence was proved. The pertinent parts of the published opinion are:

> "It is apparent that the plaintiff's evidence made a rather unsatisfactory case on the issue of liability. He points to no specific act or omission of the defendant indicating that there was a lack of due care on its part." (R. 34).

"We think, even though the trial court is of the opinion that the evidence will not support a verdict for the plaintiff, the court should ordinarily reserve its ruling on a motion for a peremptory instruction until after verdict." (R. 35).

* * * * * * *

"In view of the liberal rules which apply to actions brought under the Federal Employers' Liability Act, and in view of the absence of any explanatory evidence adduced by the defendant, we think it is not inconceivable that a jury could have inferred that the last two cars of the train should have been completely coupled up when they were first set out, in order to prevent the formation of ice on the couplers of the air hose during freezing weather, or that the defendant should have furnished the plaintiff with more adequate means of removing ice from the air hose coupling or of preventing the movement of the cars on the sloping track, or with an air line in the yard with lower air pressure. *This is not saying that upon a retrial of this case, when all the evidence is in the plaintiff will have made a case for the jury. We make no predictions in that regard and go no further than to say that in our opinion the defendant was not entitled to a directed verdict* at the close of the plaintiff's evidence." (R. 30.) (Italics added).

The Court of Appeals has *not* ruled that there was sufficient evidence in the trial to warrant a submission to the jury, in fact the Court states:

"This is not saying that upon a retrail of this case * * * plaintiff will have made a case for the jury. *We make no predictions in that regard* * * * " (R. 36) (Italics added)

Therefore, the effect of the decision is a ruling by the Court of Appeals that the District Court erred *solely* be-

cause it took the case from the jury and this ruling was made by the Court of Appeals without regard to whether or not the District Court was correct in its decision that plaintiff had not made a submissible case. This is not only contrary to the law, but under the decisions of this Court the District Judge would have been in disregard of his judicial duties if he had not taken the case from the jury when he was of the opinion that plaintiff was not entitled to a verdict, and this Court has so held:

> "The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such practice, this Court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' "
>
> *Pennsylvania Railroad Co.* v. *Chamberlain,* 288 U. S. 333, 343, 77 L. ed. 819, 825.

In a concurring opinion in a case where a state trial judge directed a verdict for defendant but where this Court held that there was sufficient evidence to have sustained a finding for plaintiff, Justice Frankfurter said:

> "It is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury's verdict could be fairly based. When a plaintiff claims that an injury which he has suffered is attributable to a defendant's negligence—want of care in the discharge of a duty which the defendant owed to him—it is the trial judge's function to determine whether the evidence in its entirety would rationally support a verdict for the plaintiff, assuming that the jury took, as it would be entitled to take, a view of the evidence most

> favorable to the plaintiff, * * * The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge."
>
> *Wilkerson* v. *McCarthy* (Concurring Opinion), 336 U. S. 53, 64-65, 93 L. Ed. 497, 506.

We submit that this Court has ruled without equivocation that in a civil suit where the evidence will not support a verdict for plaintiff, the trial court is duty bound to direct a verdict for defendant; and the decision of the Court of Appeals in this case is contrary to those prior rulings of this Court, because that decision holds in effect that it was error for the trial court to take the case from the jury upon that ground alone and not because the Court of Appeals was of the opinion that plaintiff had made a submissible case.

If the opinion of the Court of Appeals is permitted to stand, trial judges in attempting to abide by that opinion will refrain from directing a verdict for defendant in any case. A line of distinction cannot be drawn between those cases where a judge believes that plaintiff almost made a case but did not quite sustain his burden of proof and those cases where the judge is of the opinion that the evidence is utterly lacking of probative facts to sustain a verdict for plaintiff. In any trial either there is a submissible case or there is not, and there cannot be a calibration of degree on the question. It is the duty of the judge to rule in accordance with what he believes the law to be (not what he believes the law ought to be), and to require him to rule otherwise would be to reduce him to a layman who is unlearned in the law.

II

If a Trial Judge Is Not to Be Permitted to Take a Case from the Jury, He Will Be Required to Tell the Jury That the Law Is One Thing When in Fact He Knows or Believes It to Be to the Contrary.

A Judge of a United States District Court holds an enviable and proud position before the bar and society. He has the most direct contact between the Federal Judiciary and the public. When he is called upon to declare the law, his word must be respected and taken to be the law.

However, if a District Judge is required to submit a case to a jury even though he is of the opinion that a submissible case is not made, he will be required to declare as law that which he believes to be contrary to law. This would arise when the court is called upon to instruct the jury as to the law governing the issues in the case. In so doing he will be destroying against his will the respect due his position.

And this would also place the judge in a very unenviable position; as it is very conceivable that in many cases the judge will not know what to say to the jury, because he would be required to fabricate law in order to give intelligible instructions. In fact he might be required to tell the jury to determine the issues without law to guide their deliberations—thus substituting the opinion of laymen for that of the judge as to what is the law. We feel safe in saying that such would not be tolerated by this nor any Court.

III

If an Established Procedure Is to Be Reversed, This Court Should Declare the Reversal

A motion for a directed verdict at the close of plaintiff's case or at the close of all the evidence is an important pro-

cedural step in the trial of a civil case. *Rule 50, Rules of Civil Procedure for the United States District Courts,* 28 U. S. C. A., provides for the use of such motions. If the power to sustain such motions at the time of filing is taken from District Courts, the motions will become meaningless. The removal of that power would be a distinct change in an important procedural step.

It may be within the jurisdiction of the courts to change this procedural step, but it would be such an important change of such far-reaching consequences that it should be announced or affirmed by this Court and made uniform throughout the land.

We do not believe that this Court will affirm the making of such a change, and we question whether the Court of Appeals intended to make the change, but the fact remains that the published opinion below is so worded as to have that effect, and for this reason we earnestly solicit this Court to grant this petition and to enter an order reversing the opinion of the Court below.

Conclusion

We do not petition this Court in order to obtain a re-evaluation of the evidence for a determination of the question of whether or not plaintiff made a case for the jury, but instead we are deeply concerned with the question of whether or not a trial judge must refrain from directing a verdict for a defendant even though he is of the opinion that the evidence will not support a verdict for the plaintiff. The decision of the Court of Appeals has declared the law to be to that effect, and we look to this Court to correct that decision upon a question of great import in the federal law.

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